

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.220 of 2010

Gansu, son of Fatturam, aged about 30 years, occupation agriculture, resident of Malapara, Bhiragaon, P.S. Bhanupratappur, District Kanker

---- Appellant

versus

State of Chhattisgarh, through Police Station Bhanupratappur, District North Bastar, Kanker, Chhattisgarh

---- Respondent

and

Criminal Appeal No.842 of 2010

Devcharan alias Devchand, son of Kartikram, aged about 35 years, occupation agriculture, resident of Malapara, Kenwati, Police Station Bhanupratappur, District Kanker, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh, through Police Station Bhanupratappur, District North Bastar, Kanker, Chhattisgarh

---- Respondent

For Respective Appellants	:	Shri Sandeep Shrivastava and Shri D.N. Prajapati, Advocates
For State/Respondent	:	Shri Ravindra Agrawal, Panel Lawyer

Hon'ble Shri Deepak Gupta, Chief Justice

Judgment on Board

18.11.2016

1. These two appeals are being disposed of by one judgment since they both arise out of one judgment dated 24.2.2010 delivered by the Learned Sessions Judge, Kanker, District North Bastar Kanker in Sessions Trial No.34 of 2009, whereby he convicted both the accused/Appellants for having committed an offence punishable under Section 376(2)(g) of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1,000/-, in default of payment of fine, to further undergo rigorous imprisonment for one month.
2. The prosecution story, briefly stated, is that the victim (name withheld)

was living in a hostel at Malapara. It is alleged that both the accused/Appellants came to the hostel and told her that her mother was seriously ill and virtually on the death bed and, therefore, she should accompany them to the village. The victim stated that she had to take permission of her Hostel Warden. Thereafter, permission from the Hostel Warden was sought in writing and the victim after obtaining the permission of the Hostel Warden accompanied both the accused on a motorcycle. Instead of taking her to her home, they took her to the Nursery at Janakpur Road where they raped her one by one. Thereafter, when they were taking her to the house of one of the accused, she managed to run away and entered the house of her friend Jyoti. Thereafter, brother of Jyoti along with some other boys of the locality dropped her home. She informed her parents about what had happened. Next evening, the report was lodged. After the report was lodged, the victim was subjected to medical examination. Investigation was conducted and the accused were charged for having committed the aforesaid offence. They pleaded not guilty and after trial they have been convicted and sentenced as mentioned hereinabove. Hence, these two appeals.

3. One of the grounds raised in both the appeals is that the victim was above 16 years of age and she had gone with the accused of her own free will and, therefore, no case of rape is made out. It is alleged that the entire story of rape is false. Another ground raised by accused Gansu in Criminal Appeal No.220 of 2010 is that his presence at the hostel is not proved because the Hostel Warden had stated that only Devcharan had come to meet her.
4. In this case, the victim herself stepped into the witness box as PW-2. According to her, she was told by the two accused that her mother was seriously ill and she must go to the village to meet her mother.

She then boarded the motorcycle along with these two accused, but the accused took her towards another direction. She asked them why they had taken to that road. They replied that it is very cold and they have to get warm clothes from the house of Gansu. Instead of dropping her to her house, they took her to the Nursery at Janakpur Road. There was nobody in the vicinity. There, the two accused raped her one by one. She has stated that she could not raise an alarm because accused Devcharan had threatened her if she would raise an alarm he would stab her with a knife. Thereafter, they went to the house of accused Devcharan and when Devcharan was unlocking the door of his house and Gansu was holding the motorcycle, she managed to escape from there and ran away to the house of her friend Jyoti. She then informed her friend Jyoti's mother. Thereafter, Jyoti's brother and three-four other boys of the village escorted her to her residence. There she informed her parents. Then her father tried to trace out accused Gansu and Devcharan, but he could find out them and on the next day the report was lodged.

5. The law is well settled that in a case of rape, the accused can be convicted even on the sole testimony of the victim unless the testimony of the victim does not inspire confidence. There is no need for corroboration. However, in the present case, there is sufficient corroboration. Though Anita (PW-7), mother of Jyoti has not fully supported the case of the victim, but she has clearly stated that the victim immediately when she came to her house told her that she had been raped by the two accused. The accused had been named to a third person by the victim. Therefore, principle of *res gestae* will be applicable with reference to this part of the testimony. This is relevant testimony because this has happened before any story could be cooked up. Father of the girl has also made a statement to the similar effect.

6. The testimony of the victim is also supported by the testimony of the doctor. According to his opinion, the victim had been subjected to forcible sexual intercourse. He also stated that she was not habitual to sexual intercourse. Therefore, the story of the prosecution that she was subjected to sexual intercourse is in my opinion proved beyond reasonable doubt.
7. The only issue is whether this sexual intercourse was consensual or forcible. Again the testimony of the victim is that she was subjected to sexual intercourse against her will. It is pointed out by Learned Counsel for the accused/Appellants that she was above 16 years of age which is established from her mark-sheet which shows her date of birth to be 13.5.1992 and occurrence took place on 17.12.2008. Therefore, she was more than 16 years of age. However, an adult cannot be subjected to sexual intercourse without her consent. It is true as argued by Learned Counsel for the accused/Appellants that the victim went along with the accused on her own free will. In fact, she wrote an application (Ex.P-6 and P-7) which was allowed by the Hostel Warden Smt. Sadhna (PW-3). It is important to note that this application also bears signature of one of the accused Devcharan. Therefore, there is no manner of doubt that the victim left the hostel with the consent of the Hostel Warden of her own free will. In fact, the statement of the Hostel Warden is that accused Devcharan was introduced by the victim to her as a person whom she used to call as brother and in front of her the victim touched the feet of accused Devcharan.
8. It may be true that she had gone willingly, but the fact remained that her consent was obtained by deceit. She was told that her mother was seriously ill and was on the death bed. This part of her statement is fully corroborated by the Hostel Warden. Therefore, it is apparent

that this girl was led to believe by these two accused that they had come to take her home because her mother was unwell. Therefore, the consent even to leave hostel cannot be termed to be voluntarily because the same had been obtained by fraud.

9. Assuming for the sake of argument that the victim had willingly and of her own free will gone with the accused, that did not give a right to the accused to commit sexual intercourse with her. A girl has a right, as much as any boy, to move freely of her own will with members of the opposite sex. Merely because a girl goes out with a boy does not mean that the boy has a right to commit sexual intercourse with the girl without her consent. As far as rape is concerned, the statement of the victim is, in my opinion, totally reliable, especially in view of the fact that immediately after she was raped, she ran away to the house of her friend Jyoti and informed the family members of Jyoti.
10. As far as accused Gansu is concerned his contention that he was not present when the Hostel Warden gave permission may be true. It is not necessary that both Gansu and Devcharan should have gone to obtain permission from the Warden. However, in the cross-examination of the victim, nothing substantial has been extracted that accused Gansu was not there. In fact, the victim has clearly stated that when the accused turned the motorcycle at Kenwati, she asked them to take her to her mother. They informed her that they were going to the house of Gansu to pick up warm clothes. Therefore, the presence of accused Gansu is also established. As such I find no merit in these appeals.
11. At this stage, it was urged that mercy be shown as the accused/Appellants, who were young boys on the date of occurrence and have spent more than 8 years in jail. This is a case where two accused have raped a girl and, therefore, this case would fall within

the definition of offence under Section 376(2)(g) IPC as it stood prior to amendment in 2013 and, therefore, the minimum term of imprisonment has to be 10 years and this Court has no jurisdiction to award a lesser sentence unless there are adequate and some special reasons in favour of the accused/Appellants.

12. I find no substance in these appeals. Both the appeals are accordingly dismissed.

13. Before parting with the case, I am constrained to observe that the Presiding Officers in the State of Chhattisgarh are not following the provisions of Section 228-A of the Indian Penal Code and the directives issued by the Supreme Court as well as the law laid down that the victim of a sexual abuse case should not be named or identified in the judgment. In most cases, including the present, I find that in the first paragraph of the judgment of the Trial Court the name of the victim is disclosed and thereafter she is referred to as the victim. That is not proper. The victim should not be named at all.

14. Section 228-A of the Indian Penal Code reads as follows:

“S. 228-A. (1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under Section 376, Section 376A, Section 376B, Section 376C or Section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is—

(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorisation in writing of,

the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:

Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.

Explanation.—For the purposes of this sub-section, “recognised welfare institution or organisation” means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a Court with respect to an offence referred to in sub-section (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation.—The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.”

15. This section was introduced to prevent social victimisation or ostracism of the victim of a sexual offence. It is well known that in our country it is the victim of a sexual offence who is actually treated as a criminal. Though the victim may not be at fault, society treats her as an “untouchable”.
16. Therefore, the Legislature introduced Section 228-A IPC and the Apex Court in a number of cases has given directions that the name of the victim should not be disclosed in the judgment of the High Courts or Lower Courts. It was held in **Bhupinder Sharma v. State of Himachal Pradesh, (2003) 8 SCC 551** that though Section 228-A IPC does not apply to printing/publishing of judgments of the superior Courts, i.e., the High Courts and the Supreme Court, but it applies to

the Lower Courts and even with regard to the High Courts and the Supreme Court the Apex Court held that it would be prudent not to disclose the name and identity of the victim in such cases. As far as Lower Courts are concerned, they are in fact prohibited from disclosing the name of the victim and Section 228-A IPC may be attracted when the name of the victim is disclosed in the judgments of the Lower Courts.

17. As far back as in the year 1996, the Apex Court in **State of Punjab v. Gurmit Singh, (1996) 2 SCC 384** held as follows:

“21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement

in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

22. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too

ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as “discrepancies and contradictions” in her evidence.

24. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout.”

18. In **Bhupinder Sharma case** (supra), the Apex Court held as follows:

“10. The offence of rape occurs in Chapter XVI IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for “Sexual offences”, which encompasses Sections 375, 376, 376-A, 376-B, 376-C and 376-D. “Rape” is defined in Section 375. Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e. Sections 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is “the ravishment of a woman, without her consent, by force, fear or fraud”, or as “the carnal knowledge of a woman by force against her will”. “Rape” or “raptus” is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-B); or as expressed more fully, “rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will” (Hale PC 628). The essential words in an indictment for rape are *rapuit* and *carnaliter cognovit*;

but *carnaliter cognovit*, nor any other circumlocution without the word *rapuit*, are not sufficient in a legal sense to express rape; [1 Hon. 6, la, 9 Edw. 4, 26 a (Hale PC 628)]. In the crime of rape, “carnal knowledge” means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (*Stephen’s Criminal Law*, 9th Edn., p. 262). In *Encyclopaedia of Crime and Justice* (Vol. 4, p. 1356) it is stated “... even slight penetration is sufficient and emission is unnecessary”. In *Halsbury’s Statutes of England and Wales* (4th Edn.), Vol. 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman — an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

11. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery. A similar view was expressed by this Court in *Rafiq v. State of U.P.*, (1980) 4 SCC 262 with some anguish. The same was echoed again in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 SCC 217. It was observed in the said case that in the Indian setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition-bound non-permissive society of India would be extremely

reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is an inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in *Rameshwar v. State of Rajasthan*, AIR 1952 SC 54 were : (AIR p. 57, para 19)

“The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge

2. We do not propose to mention the name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short “IPC”) makes disclosure of the identity of victims of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which

Section 228-A has been enacted, it would be appropriate that in the judgments, be it of a High Court or a lower court, the name of the victim should not be indicated. We have chosen to describe her as “victim” in the judgment.”

19. In **Dinesh alias Buddha v. State of Rajasthan, AIR 2006 SC 1267** and **Om Prakash v. State of Uttar Pradesh, AIR 2006 SC 2214**, the same view was taken by the Apex Court.
20. In **State of Orissa v. Sukru Gouda, AIR 2009 SC 1019**, the Apex Court held that non-compliance with Section 228-A IPC by the Courts would be indicative of judicial indiscipline by the said Courts. Therefore, the Presiding Officers of the Courts must ensure that neither the name nor the identity of the victim is disclosed in such cases. In case, there is any violation in future, the same shall be dealt with very strictly.
21. It is, therefore, directed that henceforth if any Judicial Officer names the victim in such a case, strict disciplinary action shall be taken.
22. The Registrar General of this Court to circulate a copy of this judgment to all the Judicial Officers in this State of Chhattisgarh for strict compliance.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE